

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 192 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

GUJARAT TRADERS

Versus

KESHAVLAL DUNGARDAS SINCE DECD. THROUGH HIS HEIRS

Appearance:

MR NK MAJMUDAR for Appellant

None present for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 23/07/98

ORAL JUDGEMENT

1. On 19th March, 1998, the counsel who put appearance for the respondent informed to the court that the respondent No.1/3 Kantaben Keshavlal Patel expired on 7-3-1992. Prayer had been made for adjournment of the matter to ascertain the names of her heirs and legal representatives. The counsel for the appellant contended that the heirs and legal representatives of Kantaben Keshavlal Patel are already on record as respondents

No.1/1 and 1/2. From the title of the second appeal, I find that the respondents No.1/1 and 1/2 are the son of respondent No.1/3. As two sons of the deceased are on record of this second appeal even if some other heirs of that lady are there, estate is sufficiently represented and as such it is not necessary to bring on record of this second appeal, the other heirs, if any, of the deceased respondent No.1/3. The name of respondent No.1/3 is ordered to be struck off. Office is directed to make necessary correction in the cause title of the second appeal. This second appeal was taken up for hearing.

2. This second appeal is directed by the original plaintiff-appellant in this court under section 100 of C.P.C. against the judgment and decree of Extra Assistant Judge, Baroda in Regular Civil Appeal No.327/73 under which he has confirmed the judgment and decree of 5th Joint Civil Judge, (J.D.), Baroda passed in Regular Civil Suit No.1574/67. While admitting this appeal, this Court has framed the following substantial question of law.

"Whether the set-off of Rs.4000/- is rightly given."

3. The facts of the case, in brief, are that the plaintiff is a registered partnership firm and dealing in business of hardware, leads and paints etc.. The plaintiff is supplying these goods to the Government and also to the Municipality. The defendant-firm is a partnership firm. This firm is doing the business of commission agent and is supplying the goods to different firms, on their personal responsibility. The plaintiff has come up with a case that the plaintiff has the business relation with the defendant firm and is knowing the partners of the defendant-firm. The partners of the defendant-firm had come to the shop of the plaintiff and during the talk, the plaintiff had told the defendant No.1 to purchase the lead to which the defendant NO.1 had agreed to supply after going to Bombay. On 28-10-1968, the defendant No.1 sent a telegram to the plaintiff asking it to send the amount for purchasing the lead. The letter had also followed on 29-10-1964. The plaintiff had made a trunk-call to the defendant No.1 and agreed to purchase the stock at the rate of Rs.270/- per 100 kgs.. The defendant firm had agreed to supply the goods latest before Kartak Sud 5 and called for Rs.4000/-. The plaintiff sent Rs.4000/by draft towards the contract of lead through the broker. However, the prices had gone high and so the defendant firm turned out

from its promise and kept Rs.4000/- with it. The plaintiff had gone to Bombay to purchase the lead but the defendant No.1 had not supplied the goods and made a breach of contract. Not only this, the partner of the defendant firm have also not returned the amount of Rs.4000/-. So the plaintiff filed a suit against the defendant firm and partner and prayed for decree of Rs.4000/as principal amount, Rs.1472/towards interest from 3-11-1964 to 27-10-1967 at the rate of 12%. The plaintiff has also lodged criminal complaint regarding criminal breach of trust under sec. 406 of I.P.C. by Criminal Case NO.460/64 in the Court of J.M.F.C. Baroda.

4. The defendant contested the suit by filing a written statement in which he prayed for set-off of the amount which is due of firm against the plaintiff. Other pleas have also been taken in the written statements.

5. On the basis of the pleadings of the parties, the Trial court has framed as many as 15 issues in the case and after taking evidence of both the parties under its judgment and decree dated 7-10-1972 decreed the plaintiff's suit for Rs.1533-39 ps. with costs and further awarded interest at the rate of 9% from the date of the suit till realisation of the aforesaid amount. In the trial court, both the parties admitted that Rs.2466-61 is to be paid to the defendants by the plaintiff. The defendants have also admitted the receipt of Rs.4000/and further giving the set-off of Rs.2466-61, the trial court has passed the decree for Rs.1533-39 in favour of the plaintiff. The plaintiff dissatisfied with the judgment and decree of the trial court filed first appeal in the District Court, which came to be decided by the Extra Assistant Judge, Baroda on 10-4-1978 and the same was dismissed. Hence, this second appeal before this court.

6. Only contention made by the learned counsel for the appellant-plaintiff that both the lower courts have committed serious illegality in giving the set-off of the amount of Rs.2466-61 from the amount of Rs.4000/- as these relate to two different and separate transactions.

7. I have given my thoughtful consideration to the submissions made by the learned counsel for the appellant.

8. It is an admitted case of the parties that Rs.2466-61 of the defendants was due from the plaintiff and Rs.4000/- was due of the plaintiff from the defendant. Even if it is taken that this amount was of

different transaction still in the presence of this admission, the Courts below have not committed any error in case the matter has been decided once for all and the amount which was admitted to be payable by the plaintiff to defendant has been given set-off from Rs.4000/-. The substance of the matter has to be considered and not the technicalities. In the civil suit also, the matter has to be considered on broad aspect and no technical approach normally should have been permitted. Even if it is taken to be a case where the amounts were of different transactions and technically the set-off would not have been permissible still in case when both the parties have admitted their respective liabilities towards each other, the courts below have acted rightly and in fact have rightly given the set-off of the amount which was payable by the plaintiff to the defendant from the amount of Rs.4000/- . The substance and not the form is material and where it appears to this Court sitting under second appeal that substantial justice has been done in the matter, no interference otherwise is called for. In the presence of admission of the plaintiff and defendant of their respective liabilities of payment of amount to each other it is not a fit case in which the interference of this Court in the second appeal on the technical ground as propounded by the counsel for the appellant is called for. Otherwise also, no prejudice is caused to the plaintiff-appellant by the impugned judgment of the court below. This is another ground on which no interference of this Court is warranted. The defendants could have filed the suit for recovery of the amount of Rs.2466-61 and in view of the admission of the plaintiff the decree has to be followed. The approach of the courts below in this case had in fact advanced the cause of justice and further had avoided the multiplicity of suits.

9. Taking into consideration the totality of the facts of this case, this is not a fit case where on the ground as contended any interference of this Court is called for in this appeal.

10. In the result, this appeal fails and the same is dismissed.

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